IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17/07/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL NO.1449 OF 1991.

1.A.Ibrahim
2.A.M.N.Abdul Kadhar (died)
3.Asiammal
4.Badusha
5.Abbas
6.Rabiammal ... Appellants

(Appellants 3 to 6 are
brought on record as the
L.Rs. of the deceased 2nd appellant
as per order of the Court
dated 1.3.1994 in C.M.Ps.2390 &
2391 of 1994)

-Vs-

1.M/s.National Textiles Corporation
(Tamil Nadu and Pondicherry) Limited,
Unit:10/64, Somasundaram Mills,
Coimbatore.

2.M/s.J and J Enterprises
through its Partners
P.Jacob and C.M.Joseph,
No.14/F-1, Ansari Street,
Ram Nagar, Coimbatore-641 001. ... Respondents

Second Appeal preferred under Section 100 C.P.C. for the relief as
stated therein.

For appellants : Mr.P.Peppin Fernando

For 1st Respondent : Mr.T.R.Rajaraman
For 2nd Respondent : No Appearance

:JUDGMENT

The above Second Appeal is directed against the judgment and

decree dated 19.4.1991 rendered in A.S.No.145 of 1990 by the Court of I Additional District Judge, Coimbatore thereby confirming the judgment and decree dated 9.9.1989 rendered in O.S.No.225 of 1984 by the Court of III Additional Subordinate Judge, Coimbatore.

2. Appellants are the defendants 1 and 3 and the second respondent is the second defendant in the suit filed by the first respondent herein for recovery of a sum of Rs.26,096-06 with subsequent interest on Rs.20,473/= at 20.5% p.a. from the date of suit till repayment and for costs on averments such as that the second defendant was appointed the selling agent of the plaintiff for sale of the products manufactured by the plaintiff on commission basis for the areas of Tamilnadu and Pondicherry excluding Kanyakumari District during 1979 and they continued to act as the selling agents till recently; that as per the terms of the contract of agency, the second defendant is liable and responsible for the clearance of the goods and payment therefor by the purchasing party and also for any demurrage, warfage, overdue interest and similar charges in consequence of any delay on the part of the purchasing party in taking delivery of the goods or documents relating thereto and damages arising to the plaintiff in consequence of any default on the part of the purchasing party; that if any bill is returned by the purchasing party, the second defendant should pay the money and take delivery of the documents immediately on receipt of the advice;

3. It is further submitted in the plaint that in due course of business, the second defendant placed orders with the plaintiff for supply of goods to M/s.AMN Textiles on credit and accordingly, the plaintiff supplied goods to the said M/s.AMN Textiles periodically between 6 .8.1982 and 21.10.1982; that the said M/s.AMN Textiles drew and accepted hundies in respect of each invoice value payable 45 days after sight, but the hundies were returned without being honoured by M/s.AMN Textiles; that in respect of the above said transactions and in respect of the goods supplied by the plaintiff to M/s.AMN Textiles, a sum of Rs.20,473.23 is due from the defendants to the plaintiff; that in spite of repeated demands, the defendants failed and neglected to pay the amount due; that the defendants are liable to pay interest on the value of the goods supplied at 20.5% p.a. from the date of invoice and supplies as per the contract, Trade Usage and custom and Sale of Goods Act, thus, a sum of Rs.26,096-06 is due from the defendants to the plaintiff as on 31.3.1984 inclusive of in terest as per accounts.

4. The plaintiff would further submit that he issued a Registered Lawyer's Notice on 14.10.1983 to the defendants calling upon them to pay the balance due then and in spite of the defendants receiving the notice, they did not comply with the demands and did not send any reply; that the defendants are not entitled for any benefits under any Debt Relief Laws; that M/s.AMN Textiles as the purchaser of the goods and the 2nd defendant as the selling agent and as per the terms of agency, are equally liable to pay the amount due to the plaintiff; that the plaintiff did not have the details of the constitution of the firm M/s.AMN Textiles since they knew the first defendant only through the second defendant; that the second defendant represented and assured that M/s.AMN Textiles is the proprietary concern of the first defendant; that in the meanwhile, another Unit Mills of National

Textile Corporation i.e. Coimbatore Murugan Mills obtained a decree against the defendants 1 and 2 in O.S.No.231 of 1983 on the file of the Court of Subordinate Judge, Coimbatore; that in fact, the first defendant submitted to a decree in the above said suit, but, curiously in the execution proceedings in the said suit in R.E.P.No.78 of 1985 on the file of the Sub Court, Pudukkottai, the first defendant contended that he was not the proprietor of AMN Textiles and that the licence stands in the name of his father, the third defendant; that thereupon, the plaintiff filed an application in I.A.No.600 of 1986 on 18.6.1986 in the present suit to implead the third defendant as a party to the suit and on the said petition having been allowed, the third defendant was impleaded as a party to the suit. On such grounds, the plaintiff would pray for the relief extracted supra.

5. The first defendant would file a written statement wherein this defendant besides generally denying all the allegations of the plaint, would also submit that there is no privity of contract between the plaintiff and himself; that if at all the plaintiff has got any cause of action, he has got the same only against the second defendant and not against this defendant; that the first defendant is not liable to pay anything to the plaintiff as the former did not request the latter to supply goods to him and on this score, the suit is liable to be dismissed; that this defendant has paid a sum of Rs.3143.85 on 16.11.1982 through a demand draft and another sum of Rs.3450.20 on 19.1.1983 through a demand draft issued by the Sta te Bank of India, thus this defendant has paid a total sum of Rs.6594.05 to the second defendant as the first defendant had transactions only with him and it is unfortunate that this amount is not deducted; that the plaintiff has no cause of action against this defendant and he has to file the suit only against the second defendant. On such grounds, this defendant would pray to dismiss the suit with costs.

6. The second defendant would also file a written statement thereby denying all the allegations of the plaint and further submitting that the original agency agreement referred to in the plaint is with the plaintiff and the plaintiff failed to return one copy of the said agreement to this defendant after getting the signature of the authorised officer of the mills and therefore the plaintiff is called upon to produce the same into Court; that as a matter of fact and as per agreement, this defendant is responsible only for clearing the goods by the purchasing party and this defendant's responsibility ceases, the moment the purchasing party clears the goods; that in this case, the purchasing party i.e. the first defendant ha s cleared the goods and hence this defendant is absolved of all liabilities; that there is no contract of guarantee to make the second defendant liable along with the first defendant, hence, this defendant is not equally liable to pay the amount due to the plaintiff; that no bill was also returned by the first defendant to make the second defendant liable; that this defendant has already filed a suit in O.S.No.1164 of 1984 against the plaintiff and another for permanent injunction restraining them from enforcing the terms of the Agency Agreement in question. On such allegations, this defendant would pray to dismiss the suit with costs.

7. The third defendant would file the written statement thereby denying all the allegations of the plaint and further submitting that the alleged agreement produced by the plaintiff into the Court is only a xerox copy and it is not admissible in evidence and in any event, there is no privity of contract between the plaintiff and himself and hence this defendant is not liable to pay the suit claim; that this defendant is the proprietor of the AMN Textiles whereas the plaintiff has chosen to file a petition to implead the third defendant as a party to the suit, but still he has described the first defendant as sole proprietor; that for a proprietary concern, there can be only one proprietor and there cannot be two sole proprietors and therefore it is quite clear that the plaintiff is very much confused and he is not sure as to who is the proprietor and to whom he had supplied goods, therefore, on this score alone, the suit is liable to be dismissed.

8. This defendant would further submit that it is quite surprising to hear the plaintiff making different and contradictory statements at various places in the plaint since at one place, the plaintiff says that the AMN Textiles is a proprietary concern and at another place, he says it is a firm; that the plaintiff should make himself clear as to whether the AMN Textiles is a partnership firm or proprietary concern or a shop at all before he files the suit; that in O.S.No.234 of 1983, the plaintiff made an unsuccessful attempt to implead this defendant as a party to the suit and in spite of the said plea was rejected, the plaintiff has not chosen to file any appeal; that even in R.E.P.No.78 of 1985, on the file of the Court of the Subordinate Judge of Pudukottai, the Court was pleased to give a finding that this defendant could not be impleaded; that the claim against this defendant is hopelessly barred by limitation since according to the plaintiff, the suit transaction had taken place from 6.8.1982 to 21.10.1982 and the plaintiff issued a notice to the defenda nts 1 and 2 on 14.10.1983 and the petition to implead the third defendant was filed into the Court only on 18.6.1986 and therefore the suit claim was barred by limitation on 21.10.1985 itself. On such averments, this defendant would pray to dismiss the suit with costs.

9. Based on the above pleadings, the trial Court having framed seven issues and two additional issues would conduct the trial wherein on behalf of the plaintiff, one witness would be examined as P.W.1 for oral evidence and twenty one documents would be marked as Exs.A.1 to A.21 for documentary evidence. On the contrary, even though the defendants 1 and 3 would examine themselves as D.Ws.1 and 2 for oral evidence, no documentary evidence would be submitted on behalf of the defendants.

10. In appreciation of the said evidence placed on record, the trial Court would ultimately decree the suit. Aggrieved, the defendants 1 and 3 in the suit have preferred an appeal before the I Additional District Judge, Coimbatore and the said Court also having framed three points for determination and having appreciated the facts and circumstances of the case in its own way in the light of the evidence adduced, would ultimately dismiss the appeal thereby confirming the judgment and decree passed by the trial Court. It is only aggrieved against such concurrent findings of both the Courts below, the defendants 1 and 3 in the suit have come forward to prefer the above Second Appeal on certain grounds as brought forth in the grounds of

appeal and this Court admitted the same for determination of the following substantial questions of law:

1.Whether both the Courts below erred in holding that the suit is not barred by limitation as against 2nd appellant?

2.Whether both the Courts below were right in invoking proviso to Section 21 of the Limitation Act, when there are no plea on prayer in I.A.No.600 of 1986 or in the amended plaint invoking the said proviso?

3.Whether both the Courts erred in granting these reliefs (invoking the proviso to Section 21) without giving an opportunity to the appellants to oppose such relief?
4.Whether the judgments of both the Courts are liable to be set aside as there had been gross violation of natural justice?

5.Whether both the Courts below failed to note that the suit is bad for misjoinder of parties and the first appellant is not liable for the suit claim?

11. During arguments, the learned counsel appearing on behalf of the appellants would insist two points, the first one being that there has been no privity of contract in between the appellants and the first respondent and therefore they are not liable for the arrears said to have been accumulated in the transaction in which the same has been arrived at, secondly, the learned counsel would allege that the period of limitation was over as early as on 21.10.1985 itself so far as it is concerned with the third defendant, i.e. the second appellant herein regarding whom steps have been taken only after the date of limitation which ends as on 21.10.1985. On such arguments, the learned counsel would pray to allow the appeal setting aside the judgments and decrees passed by both the Courts below.

12. In reply, the learned counsel appearing on behalf of the first respondent would submit that both the above questions raised herein have been well considered and answered in the negative by both the trial Court and the appellate Court. The learned counsel would further submit that between himself and the second defendant, who has to settle the amount to the company on his behalf, was made clear under Ex.A.1 and therefore the question of privity of contract cannot be raised and the same has been well considered and answered by both the Courts below in a concurrent manner. Likewise, the learned counsel would further point out that regarding limitation also, Section 21 of the Limitation Act has been adopted by the Courts below for having impleaded the second appellant herein as the third defendant to the suit and would cite the relevant passages from not only the trial Court's judgment but the appellate Court's as well. On such arguments, the learned counsel would pray for dismissing the appeal as devoid of merits with costs.

13. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, if on the backdrop of all those discussions held herebefore, the substantial questions of law are to be determined, needless to mention that the first

three substantial questions of law are to the point of limitation, the fourth one is regarding the violation of natural justice and the fifth is regarding the mis-joinder of parties and the liability of the first appellant.

14. So far as it is concerned with the question of limitation, it rages supreme only regarding the second appellant herein who is the third defendant to the suit who came to be added as a party only in the year 1986 and therefore the appellants would come forward to plead that the period of limitation expired at the time that the second appellant was impleaded as a party and therefore the suit is barred by limitation so far as it is concerned with the second appellant/third defendant. At this juncture, as it has been well dealt with by both the Courts below, it is Section 21 of the Limitation Act, which is relevant for consideration and therefore it has become necessary to extract the said Section:

"21.Effect of substituting or adding new plaintiff or defendant:
(1) Where after the institution of a suit, a new plaintiff or, defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:
PROVIDED that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff."

15. Sub Section (1) of Section 21 of the Limitation Act coupled with the proviso is specific that after the institution of the suit, if a new plaintiff or defendant is substituted or added, the suit shall, as regards it, deemed to have been instituted when he was made a party. The Section is expressive in a simple language coming out with a deeming provision regarding the new plaintiff or defendant either substituted or added in the suit after the institution of the same and therefore, the case of the second appellant/the third defendant definitely falls within the ambit of this Section. Further more, in any event, if a new party or defendant has been impleaded of late, due to a mistake made in good faith, the Court can direct that it shall be deemed to have been instituted on an earlier date. Therefore, it coud be very safely concluded that under this provision of law, the suit regarding any party to the proceeding is not at all barred by limitation and hence the substantial questions of law No.1 to 3 are answered against the appellants and in favour of the first respondent.

16. So far as the 4th substantial question of law, `whether the judgments of both the Courts are liable to be set aside as there had been gross violation of natural justice', is concerned, a careful perusal of the judgments of the Courts below would show that the trial Court, having framed the issues and points for consideration respectively and the trial Court having conducted the trial and recording the evidence in the manner required

by law with due opportunity for parties to be heard in full and in appreciation of such evidence placed on record, has arrived at the valid conclusion to decree the suit. Likewise, the appellate Court also, having framed its own points for consideration, following the procedures laid down by law and with adequate opportunities for parties to be heard and having its own discussions on the points framed has arrived at its conclusion to concur with the findings of the trial Court and in the said process by both the Courts, no legal infirmity or inconsistency or lack of opportunity much less in violation of the principles of natural justice is able to be found as a result of which, this Court is of the firm view that this substantial question of law also does not come to the rescue of the appellants and it is decided against them.

17. Regarding the fifth substantial question of law, for all the above discussions held and for all the reasons assigned by the trial Court and the first appellate Court as well for impleading not only the second defendant but also the third defendant to the suit, this Court is not able to see any party being added unnecessarily or out of context and therefore it cannot, under any circumstance, be termed that the suit has become bad for mis-joinder of parties much less in impleading the first appellant and therefore the only conclusion that could be arrived at by this Court is to hold that the 5th substantial question of law could also be decided only against the appellants and the same is decided accordingly.

18. In short, there is absolutely no room for the least doubt to be entertained not only in both the Courts below arriving at the conclusion to decree the suit and confirm the same in a concurrent manner, for reasons assigned, as they have decided, this second appellate Court does not find any valid or tangible reason existing to cause its interference as it has been sought to be made on the part of the appellants which is not only unnecessary but unwarranted as well and the only conclusion that could be arrived at in the circumstances of the above second appeal is to dismiss the same.

In result,

(i) there is no merit in the above second appeal and the same is dismissed.

(ii)The judgment and decree dated 19.4.1991 rendered in A.S.No.145 of 1990 by the Court of I Additional District Judge, Coimbatore thereby confirming the judgment and decree dated 9.9.1989 rendered in O.S. No.225 of 1984 by the Court of III Additional Subordinate Judge, Coimbatore is hereby confirmed.

However, in the circumstances of the case, there shall be no order as to costs.

Index: Yes
Internet: Yes
Rao

To

1.The I Additional District Judge,
Coimbatore.

2.The III Additional Subordinate Judge,
Coimbatore.